

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,	) NO. 62318-4-I
	)
Respondent,	)
	)
v.	) UNPUBLISHED OPINION
	)
DIEM NGUYEN,	)
	)
Appellant.	) FILED: July 27, 2009

BECKER, J. — Diem Nguyen appeals the trial court order denying his motion for a new trial based on two pieces of newly discovered evidence, childhood medical records and a psychologist's evaluation. We conclude the trial court did not abuse its discretion in denying the motion because the medical records are not material and would not change the result at trial, and the psychologist's opinion would not have been admissible at trial and could have been discovered before trial through due diligence. We affirm.

In 2006 Nguyen was charged with two counts of first degree assault, one

count of first degree malicious mischief, and one count of first degree unlawful possession of a firearm. The charges arose from a shooting in Seattle on the morning of July 22, 2006. Based on a report of gunfire with a possible shooting victim, police were summoned to a house where they found two victims, Nam Hoang, who had been shot six times, and his girlfriend, Lihn Dihn, who had been shot three times. Both victims suffered life threatening wounds. Hoang and Nguyen had been friends for more than six years, and Nguyen had attended a party at the house the previous night.

Three hours after the reported shooting, Nguyen turned himself in at a King County Sheriff's substation and said that he had shot his best friend. When a deputy asked Nguyen some basic questions, Nguyen rambled on for a while, saying he was high on methamphetamine and didn't know what he was doing. He was sweating heavily and kept moving around in the chair with his head down. A Seattle police officer arrived and advised Nguyen of his rights. Nguyen kept saying he did not want to go to jail. He was screaming and crying, insisting he had killed his best friend and repeating he was high on methamphetamine. Nguyen also said that he did not know why he was arrested, he did not want to go to jail, and he wanted to go home. Seattle Police transferred Nguyen to a holding cell. Nguyen escaped by making a hole in the wall, but was caught in a stairwell.

Nguyen's defense at trial was

that someone else committed the shooting. Defense counsel challenged the reliability of the victims' identification of Nguyen as the shooter. Counsel also challenged the reliability of Nguyen's admissions, attributing them to being high on methamphetamine. Nguyen sought to introduce testimony of a family member who would testify as to Nguyen's increasing methamphetamine use in the months before the shooting and of Nguyen's former attorney who would testify that several days after the arrest Nguyen still appeared to be under the influence of methamphetamine. Defense counsel took the position that an expert witness was unnecessary because the jurors could judge Nguyen's state of mind for themselves. The State opposed evidence of methamphetamine use unless Nguyen called an expert witness. Nguyen clarified that he was not raising a diminished capacity defense and did not intend to call an expert witness. The trial court excluded the testimony of the family member and former attorney on the ground it was not relevant without expert testimony. But the court allowed reference to Nguyen's methamphetamine use as some evidence of intoxication without any particular specification as to what methamphetamine does.

Deputy James Schauers testified that based on experience he was able to recognize when someone was high on methamphetamine, that Nguyen's behavior at the station was consistent with methamphetamine use, and that in his opinion it was clear that Nguyen

was under the influence of methamphetamine.

The State then gave notice of its intent to call a forensic scientist as a rebuttal witness to testify regarding the effects of methamphetamine on mental processing. Nguyen objected, noting his position that he was intoxicated when he talked to police officers and that his intoxication should be taken into account in judging the credibility of his statements, but expert testimony was not required. The court excluded the State's rebuttal witness.

The jury found Nguyen guilty as charged of two counts of first degree assault while armed with a firearm and one count of malicious mischief in the first degree for the damage to the holding cell. Nguyen waived his right to a jury trial on the first degree unlawful possession of a firearm charge and was convicted by the court of this charge. The court imposed a standard range sentence of 495 months.

Nguyen appealed his convictions, raising three issues: his right to silence was infringed when police officers testified about Nguyen's post-arrest refusal to cooperate and make a statement; the trial court erred in denying his motion for a mistrial based on witnesses' references to gangs; and a sentencing issue. We rejected his contentions and affirmed. State v. Nguyen, 146 Wn. App. 1029 (2008), rev. denied, 165 Wn.2d 1039, 205 P.3d 131 (2009).

Subsequently Nguyen obtained a new attorney and in May 2008 filed a CrR 7.8(b) motion for a new trial

based on newly discovered evidence. Counsel explained that when he inquired of Nguyen's family members whether Nguyen had ever suffered significant head injuries, the family members said that he had as a young child in Vietnam.

Family members requested and eventually obtained Nguyen's medical records from a hospital that treated him. The records suggest that at age seven Nguyen had a mild brain activities disorder or hemorrhagic fever.

Nguyen's new attorney also arranged for psychologist Kenneth Muscatel to conduct a forensic evaluation of Nguyen. Dr. Muscatel administered the Multiphasic Personality Inventory (MMPI), reviewed the evidence, and interviewed Nguyen. Nguyen reported that before the shooting he had been using methamphetamine daily for two years and before that he had used marijuana and cocaine. He reported no recollection of the shooting, but recalled hearing voices and seeing things that were not there. Nguyen thought the witnesses at trial were lying and believed he did not do anything that warranted his convictions. Dr. Muscatel reported that the results of the MMPI were not valid. Dr. Muscatel also reviewed the medical records from Vietnam, but did not otherwise rely on them. Dr. Muscatel concluded that Nguyen was in a highly impaired mental state: "[Nguyen] was likely highly severely intoxicated at the time of the incident, including having used methamphetamine for months, not sleeping for days, losing a great deal of weight and becoming increasingly erratic and paranoid." He also

opined that a drug induced psychosis at the time was quite possible. Dr. Muscatel concluded that these factors would likely constitute mitigation as to the charges and/or sentence and that the potential of an intoxication defense should have been considered by the jury.

Nguyen argued that his childhood medical records, along with Dr. Muscatel's report, constituted newly discovered evidence justifying a new trial. He argued that while there was some evidence of his drug use at trial, there was no medical evidence or expert opinion about the effect of the methamphetamine on him and that if Dr. Muscatel had testified at trial, Nguyen would have been entitled to a voluntary intoxication or diminished capacity instruction.

The court denied Nguyen's motion for a new trial. The court found that Nguyen's childhood medical records could not have been discovered before trial with due diligence and were therefore newly discovered, but concluded the evidence was immaterial and not likely to change the result. The court found that defense counsel at trial elected to raise a voluntary intoxication defense and was permitted to argue it without an expert regarding the effects of methamphetamine. The court concluded that Dr. Muscatel's opinion would not have been admissible at trial.

Nguyen appeals, contending the trial court erred in denying his motion for a new trial. A new trial will not be granted on the basis of newly discovered evidence unless the moving party

demonstrates that the evidence “(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). The absence of any one of these factors is grounds to deny a new trial. Williams, 96 Wn.2d at 223. This court reviews a CrR 7.8 ruling for an abuse of discretion, and a denial will not be reversed except for an abuse of discretion. State v. Swan, 114 Wn.2d 613, 642, 790 P.2d 610 (1990).

Nguyen contends that the trial court erred in finding his childhood medical records from Vietnam are not material. We disagree. The records show only that at age seven, more than 20 years earlier, Nguyen suffered from a mild brain activities disorder or hemorrhagic fever. Dr. Muscatel noted only that he had reviewed the records, but he neither drew any conclusions from them nor relied on them. And although Nguyen has lived in this country since age 10, he offered no other evidence tying his early illness or diagnosis to his later life. Even if we assume Nguyen’s childhood medical records could not have been discovered before trial through due diligence, Nguyen has not demonstrated that the evidence is material or that it would probably change the result.

Nguyen also contends that the trial court erred in concluding that Dr. Muscatel’s opinion would not have been admissible at trial. Admissibility of expert testimony is governed by ER

702, which requires that the witness be qualified as an expert and that the testimony would be helpful to the trier of fact. In other words, the expert's opinion must concern matters beyond the common knowledge of the average layperson and not mislead the jury. State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004). It is not enough that a defendant may be diagnosed as suffering from a particular mental disorder. State v. Atsbeha, 142 Wn.2d 904, 921, 16 P.3d 626 (2001). To be admissible in support of a defense of diminished capacity, expert testimony must establish how the alleged mental condition impaired the defendant's ability to form the requisite level of intent. Thomas, 123 Wn. App. at 779. Put differently, expert testimony must establish a mental disorder or condition, not amounting to insanity, and logically and reasonably connect the alleged mental condition with the inability to form the requisite intent. Thomas, 123 Wn. App. at 779.

The jury was instructed that to find Nguyen guilty of first degree assault, it had to find beyond a reasonable doubt that he acted with the intent to inflict grievous bodily injury. Dr. Muscatel stated his opinion that Nguyen was in a highly impaired mental state, was likely severely intoxicated, and quite possibly was in a drug induced psychosis at the time of the shooting, but he did not explain how that disorder would operate to affect Nguyen's ability to form the intent to commit grievous bodily injury. See State v. Mitchell, 102 Wn. App. 21, 27, 997 P.2d 373 (2000). The trial



court did not err in concluding Dr. Muscatel's opinion would have been inadmissible.

And even if we were to conclude that Dr. Muscatel's opinion would have been admissible, Nguyen has not demonstrated that he could not have discovered it before trial by the exercise of due diligence. Trial counsel knew of Nguyen's erratic behavior and his repeated statements to the officers that he was high on methamphetamine. Trial counsel also knew relatives believed Nguyen's methamphetamine use had been increasing during the months leading up to the shooting and that a former attorney believed Nguyen was still under the influence of methamphetamine days after his arrest. This was more than adequate to suggest the possible value of exploring a diminished capacity defense and seeking an expert opinion. But trial counsel made a strategic decision not to do so and instead presented a defense that someone else committed the crime and that Nguyen's repeated statements that he shot his best friend were not credible because he was high on methamphetamine. In short, trial counsel could have sought Dr. Muscatel's opinion before trial, but chose not to do so. The fact that Nguyen's new counsel may have taken a different approach is not a basis to warrant a new trial based on newly discovered evidence. State v. Thach, 126 Wn. App. 297, 318-19, 106 P.3d 782 (2005) (defendant convicted of second degree assault was not entitled to new trial based on evidence the victim

suffered from bipolar disorder where defendant knew of the disorder before trial); State v. Evans, 45 Wn .App. 611, 614-15, 726 P.2d 1009 (1986) (defendant who lost at trial, then hired a new attorney, who hired a new expert, who examined the same physical evidence and gave a different opinion, was not entitled to a new trial).

Nguyen emphasizes that the two pieces of new evidence must be considered together and that it was receipt of the childhood medical records that prompted counsel to seek an expert opinion. Our analysis does not change whether we consider the evidence separately or together. Trial counsel was well aware of the possible value of seeking an expert opinion on diminished capacity and chose not to do so.

Finally, in response to Nguyen's arguments in his reply brief, we note that Nguyen does not argue that his trial counsel was ineffective in failing to seek an expert opinion before trial or in failing to request a voluntary intoxication instruction, and that Nguyen has not and cannot argue that he is entitled to a new trial based on the State's alleged improper closing argument.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, A.C.J.

Jan, J.